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Supreme Court, U.S.
FILED
SEP 30 1996
CLERK

No. 95-1938

IN THE SUPREME COURT OF THE UNITED STATES

October, 1995, Term

ALLEN A. IZADPANAH, et al
Petitioners

v.

EDWARD GROSS, et al,
Respondents

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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REPLY ARGUMENT

I. The courts below misconstrued the Feldman decision. Defendants' state that there are three questions presented by Izadpanah's petition. The first of these is said to be whether the district court had jurisdiction to overturn a state court decision. However, this issue was withdrawn in the court of appeals.

It is Izadpanah's position that the only portion of the case which was affected by such withdrawal was his request that the district court, sitting as a federal court and exercising its original jurisdiction, review a ruling of the Virginia state court which allegedly denied federal due process, i.e., a ruling that the latter court had jurisdiction over Izadapanah's stock, for purposes of an attachment, notwithstanding that such stock was located in Maryland. Izadpanah was not requesting any other "review" of the Virginia court's rulings.

The appeal of the district court's denial of the said limited request for review was withdrawn upon a reconsideration by Izadpanah's counsel of the effect of District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983). Prior to the withdrawal, Izadpanah had contended that Feldman could be distinguished, relying on other authority.

The Feldman case holds that a review of an alleged violation of federal law by a state court is to be sought within the state court system through its court of last resort, and if such an appeal is unsuccessful, the matter is to be brought before this Court, rather than a lower federal court.

Notwithstanding its applicability only to the said limited requested for review, the Feldman ruling has been construed in this case to apply to Izadpanah's additional request that the district court, sitting as a state court and exercising its supplemental and/or diversity of citizenship jurisdiction, set aside the entry of a judgment by the state

court. The grounds for the latter request were an alleged fraud on the state court and on Izadpanah, in violation of state law.

The Court will please note that the latter request is completely unaffected by the ruling of Feldman, inasmuch as there is no allegation that the state court did anything wrong, much less that the state court violated federal law.

The misapplication of Feldman by the district court and the court of appeals to Izadpanah's claim of fraud on the state court under state law has led Defendants to contend that Izadpanah still presents the issue of a "review" of the rulings of the state court, generally. In this regard, Izadpanah contends that it is only the scope of the Feldman decision which is still at issue.

II. Izadpanah is not attempting to retry his state case. Defendants say that the second question presented is whether Izadpanah is attempting to "retry his (state court) case in federal district court." In this regard, the Court will note that neither of the two state court cases in question, the Boeing litigation and the Sirex collection case, involved any of the issues raised in the instant case, other than with respect to two aspects of the Sirex case. The Boeing litigation contained no issues of fact or law which logically can be construed as similar to the issues of the instant case.

The said two aspects of the Sirex case are (1) the method by which Defendants settled the Sirex case, i.e., the allegation that such settlement, which included a consent judgment, was obtained by fraud, and (2) the manner in which Defendants sought to enforce such consent order, i.e., the alleged denial of due process described above as the issue which was withdrawn in the court of appeals.

Thus, in light of the said withdrawal as to the enforcement of the Sirex judgment and the lack of connection to the Boeing litigation, it appears that Defendants'

version of the second issue is that, by alleging fraud on the state court and himself, Izadpanah is attempting to retry that portion of the Sirex case in which he attempted to raise the fraud issue.

However, this argument is presented by Defendants as though Izadpanah were attempting to have the consent judgment in the Sirex case "ignored (or) set aside" by the federal court in the same sense that one would ask to have a state court judgment set aside because of some incorrect ruling by the state court.

Thus, Defendants' description of the so-called second question is misleading, in that the issue to which they actually are referring is whether the district court was correct in applying the doctrine of res judicata to dismiss Izadpanah's state law fraud claims, not whether Izadpanah asked the district court to set aside a state court decision because of an alleged error by the state court.

As to Defendants' version of the third question presented by the petition, whether the district court properly applied "the doctrines of claim and issue preclusion," the Court will note that such version is simply another manner of expressing the actual issue in the so-called second question, i.e., the actual issue of whether the district court properly applied the doctrine of res judicata.

III. Defendants' argument on the facts is misleading in several respects. On Page 1 of their brief Defendants make much of the state court finding, adopted by the district court, that Izadpanah had not paid the debt to Sirex upon which the consent judgment was based.

However, at no point do the Defendants address the relevant issue with respect to payment of the Sirex debt, i.e., whether Sirex was paid secretly by the Defendants, prior to the inducement of the settlement of the Sirex case and the entry of the consent judgment. Therefore, it is misleading for Defendants to argue that there is any relevance in Izadpanah's failure to pay the Sirex debt.

On Page 1 of their brief, Defendants state that Izadpanah "previously, unsuccessfully argued the precise issues resurrected in his current case," in the state trial court, unsuccessfully appealed such issues to the Virginia Supreme Court and was denied a writ of certiorari in this Court, as to such issues. This argument is also made at Page 7 of Defendants' brief.

However, Defendants fail to note that it was the refusal of the state court to decide Izadpanah's state law fraud claims which was appealed, not an adverse ruling on the substance of such claims. As was said at Page 14 of the petition for writ of certiorari in Benzinger V. Sirex, U.S.A., Inc., No. 93-1870 in the October, 1993, term of this Court:

> Although repeatedly brought to its attention, the trial court never considered the misrepresentation and deceit by the (Defendants) ... and ignored the clear evidence that the debt was actually paid ....

Therefore, it is misleading for Defendants to argue that the fraud claims were decided by the state court and that Izadpanah's prior petition presented the same issues as are presented herein.

As to Izadpanah's federal law claims of securities fraud and violation of civil rights, it is obvious that they were not before the state court.

On Page 2 of their brief, Defendants complain about Izadpanah's failure to cite any evidence in the record relating to the alleged fraud. This argument supports Izadpanah's position that the district court should have allowed the case to go to trial, i.e., that the district court should have taken evidence before deciding the case.

As to evidence in opposition to Defendants' motion for summary judgment, Izadpanah submitted affidavits and exhibits in support of the allegations of the complaint.

IV. The effort to cast Izadpanah's case in a bad light, by reference to the sanctions order, is misleading. On Page 2 of their brief, Defendants refer to the sanctions imposed by the district court on remand by the court of appeals, in support of their contention that Izadpanah's case is based upon speculation and assumption.

However, Defendants fail to mention that Izadpanah's counsel have been sanctioned because the district court concluded, solely because of the withdrawal of the issue on appeal described above, that such counsel had advanced the argument in question for other than a non-frivolous purpose. Counsel have not been sanctioned because of a finding that such argument itself was frivolous. Nor have counsel been sanctioned because of any finding that the other arguments advanced in this case are frivolous.

In fact, the district court has twice found that the arguments advanced by Izadpanah were not frivolous, the first such finding being expressly made in its denial of Defendants' initial motion for sanctions and the second such finding being made by necessary implication in sanctions order.

Also, the district court did not find that Izadpanah's pre-filing investigation of the facts was inadequate. The only reference in the sanctions order to the pre-filing activity of Izadpanah's counsel is the admonition that counsel should have reached their conclusion, as to the lack of value of the precedent upon which they were relying, prior to the late stage of the appeal at which counsel changed their minds and withdrew the issue. The Court will note that the latter admonition is made notwithstanding the finding that the issue itself was not frivolous, as opposed to its prosecution.

The Court will please note that the order for sanctions has been appealed on several grounds, the main issue being whether an attorney who changes his mind, in good faith, about the wisdom of proceeding with a non-

frivolous issue, and withdraws the issue in accordance with rules of ethics and FRCP 11, may be sanctioned solely because of such withdrawal. In this regard, the Court will please note that the withdrawal was taken, in and of itself, as sufficient evidence of a lack of serious purpose in prosecuting the issue in the first instance.

In light of the foregoing, it is misleading for the Defendants to argue that, because sanctions have been imposed, the district court concluded that Izadpanah's case was based on speculation and assumption.

V. There is a basis under Rule 10 for granting the writ. On Page 3 of their brief, Defendants argue that the provision of Rule 10, that a writ of certiorari is rarely granted where the asserted error is the misapplication of a properly stated rule of law, is applicable herein. However, Izadpanah contends that the district court and the court of appeals have misstated the rule of Feldman, supra, in that the latter decision of this Court, contrary to the rulings of the lower courts herein, does not apply to the setting aside of a state court judgment by a district court sitting as a state court and applying state law under its supplemental or diversity of citizenship jurisdiction, especially where the state court judgment is to be set aside for fraud on the state court, i.e., especially where the state court is the alleged victim of wrongdoing, rather than a source of error.

VI. The alleged fraud on the state court did not arise from a mere evidentiary dispute. On Page 7 of their brief, Defendants cite Cleveland Demolition v. Azcon Scrap, 827 F.2d 984 (4th Cir. 1987) for the proposition that a routine evidentiary dispute cannot be the basis for a separate fraud action. However, such proposition is not applicable herein, inasmuch as the fraud in this case is alleged to have occurred before the entry of the Sirex consent order, unrelated to any

evidence in the Sirex case. Also, with respect to any evidentiary dispute that may have developed had the state court entertained the fraud claims in the course of the enforcement of the consent order, there obviously was none, because the state court refused to consider the fraud claims.

VII. The injunction tolled the period of limitation on Izadpanah's securities law claim. On Page 8 of their brief, Defendants argue that, on its face, the state court injunction did not apply to the instant case. Izadpanah contends that, under the circumstances surrounding the injunction, it was reasonable for him to interpret it such that the filing of this case would have been in violation thereof. In particular, with respect to the admonition not to file on behalf of Aidant, Inc., Izadpanah's purpose in the instant case is to regain ownership of his Aidant stock, so that he can prosecute a derivative action on behalf of Aidant.

The district failed to address the injunction issue in any manner, notwithstanding the factual dispute as to the meaning of the injunction.

In any event, even if Defendants are correct in their interpretation of the injunction, the point affects only Izadpanah's securities law claim under S.E.C. Rule 10b-5. This is because only the latter portion of the case is subject to a one-year period of limitation, pursuant to Lampt, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350 (1991), and it is only such a one-year period that is affected by the injunction.

VIII. Defendants' argument as to the three-year period of limitation on Izadpanah's securities law claim is not only incorrect, but also misleading. On Page 9 of their brief, Defendants argue that the measuring point for the beginning of the three-year period of limitation on Izadpanah's Rule 10-b5 claim, set by this Court in the Lampt

decision, is the time of the fraud. Defendants cite Howard v. Haddad, 962 F.2d 328 (4th Cir. 1992) for the proposition that it is the securities law "violation" which marks the beginning of the three-year period.

However, it is the securities transaction by which Izadpanah was defrauded that marks the beginning of the period. This is because Rule 10b-5 requires that a transaction occur before there is a violation of the rule. Notwithstanding that Izadpanah makes this point in his petition, Defendants fail to address it.

On Page 10 of their brief, Defendants attack the validity of Izadpanah's allegation that he was deprived of his stock on August 29, 1991, the date of entry of the stock turnover order, and his argument that, therefore, the latter date is the correct measuring point for the beginning of the said three-year period of limitation, inasmuch as it evidences the "transaction" in this case. Defendants attack Izadpanah's said argument notwithstanding that the district court is quoted on Page 11 of Defendants' brief to the effect that Izadpanah "lost ownership of the stock pursuant to the Stock Turnover Order entered by the Fairfax Court."

As to Izadpanah's allegation that the pattern of fraudulent conduct resulting in the loss of his stock on August 29, 1991, Defendants argue that they took no action on August 29, 1991, yet that is the date they obtained the stock takeover order, allegedly in furtherance of their fraudulent scheme.

Also, for the Defendants to suggest that the state court's action on the latter date is somehow a subject of Izadpanah's fraud claim is misleading, in that it is fraud on the state court about which Izadpanah is complaining, not any action of the state court (now that the due process issue has been withdrawn). It would appear that Defendants are attempting to blur the line between Izadpanah's claim that the Virginia court denied him due process in attaching the stock

in Maryland (which claim has now been withdrawn), and Izadpanah's claim that he has been damaged because of the alleged fraud on the state court.

On Page 10 of their brief, Defendants argue that the district court "made a specific factual determination that the Plaintiff (Izadpanah) knew the facts giving rise to his fraud claims in 1991." It is Izadpanah's position that Defendants are making this argument based on an obvious misconstruction of the facts by the district court; and that their argument is misleading.

It is obvious from the record that the fraud was not discovered until 1992, and that, in referring to the facts known to Izadpanah in 1991, the district court must have either been confused as to the date of the discovery of the fraud, or been referring to the other facts involved in the fraud, i.e., the entry of the consent judgment, etc., which were not known by Izadpanah to have been carried out with fraudulent intent, until the 1992 discovery of the fraud.

Moreover, Defendants attempt to bolster this confused view of the facts by quoting a 1991 state court pleading (not identified in the record) which contains a reference by Izadpanah to "the complexity of the fraud," arguing that this reference to a fraud means that Izadpanah knew in 1991 of the fraudulent manner by which the Sirex judgment had been obtained. The Court will please note that the fraud to which Izadpanah was referring in 1991 was the fraud said to have resulted from the wrongful manner in which the sale of the stock was conducted in 1991, before the pertinent fraud was discovered in 1992; and that the reference in the 1991 pleading was not to the fraudulent scheme to obtain the judgment.

Izadpanah contends that it is an understatement to characterize Defendants' latter argument, concerning the state of Izadpanah's 1991 knowledge of the pertinent fraud, as misleading.

IX. Defendants do not address Izadpanah's argument as to the forced seller doctrine. On Page 11 of their brief, Defendants argue that the forced seller doctrine applies to corporate merger situations, without addressing the point made by Izadpanah in his petition, i.e., that there is no restriction of the application of the doctrine to corporate mergers.

X. Defendants' argument as to the period of limitation for Izadpanah's civil rights claim is misleading. On Page 12 of their brief, Defendants repeat the misleading argument described above, with respect to a so-called finding by the district court that Izadpanah knew about the fraud to deprive him of his stock in 1991, well before the fraudulent scheme was discovered in 1992.

Defendants make no effort to distinguish Cox v. Stanton, 529 F.2d 47 (4th Cir. 1975), the authority relied upon by Izadpanah and which is directly on point, as to his position that the period of limitation for his civil rights claim began to run upon his discovery of the fraud, not at the time of the fraud.

XI. Defendants' argument as to the basis for Izadpanah's civil rights claim is not responsive. Izadpanah contends that the district court erred in ruling that he had not stated a claim under 42 U.S.C. Section 1983 (as set forth in the amended complaint), because the basis for such ruling was a finding that the Sirex judgment was valid. The district court ruled that the enforcement of a valid judgment cannot be the basis for a Section 1983 action, a point with which Izadpanah does not take issue. However, Izadpanah does take issue with the district court's said finding that the Sirex judgment was valid, without there having been a trial of the allegedly fraudulent inducement of the consent judgment, and on that ground, Izadpanah contends that the district court erred.

At Page 13 of their brief, Defendants argue that Izadpanah has not stated a claim for violation of Section 1983, without addressing the foregoing point made by Izadpanah, i.e., without explaining how the district court could find that there was no fraud without a trial of the issue.

Rather, Defendants argue that Section 1983 was not intended to provide relief where the agent of the government, in this case the state court judge, acted innocently. However, in Lugar v. Edmondson Oil Co., 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982), it was held that the defendant's procurement of a wrongful attachment of the plaintiff's property constituted a civil rights violation under 42 U.S.C. Section 1983. The defendant in that case acted jointly with a sheriff, who was not at fault, to deprive the plaintiff of his property, and such deprivation was held to have been under color of state law. Herein, it is alleged that Defendants acted jointly with a state court judge, who was not at fault, to deprive Plaintiff of his stock.

Thus, Plaintiff contends that the Lugar decision directly supports his civil rights claim herein, and it is cited in response to Defendants' argument Section 1983 is not applicable, notwithstanding Izadpanah's position that the actual issue is whether the district court erred in finding the Sirex judgment to have been valid and using such finding to rule on the civil rights claim.

XII. Defendants' argument as to Izadpanah's state law fraud claims is misleading. At Page 14 of their brief, Defendants contend that, the state law fraud claims having depended on "the erroneous factual premise that the debt was paid, they were properly dismissed." Defendants repeat the misleading argument concerning payment of the Sirex debt, i.e., that the state court found that Izadpanah had not paid the debt, without reference to the fact that the relevant point is the allegedly secret payment

of the debt by the Defendants. The misleading character of this argument is explained in Section III of this reply brief.

XIII. With respect to the applicability of res judicata, Defendants' repeat their misleading argument concerning Izadpanah's knowledge of the fraud in 1991. There are three important aspects of Defendants' response to Izadpanah' argument that res judicata does not apply herein to preclude consideration of his state law fraud claims.

The first important aspect of Defendants' response is their failure to address Izadpanah's contention that the state court declared on the record that it was not deciding the fraud issue, and that the state court actually rejected Izadpanah's proffer of his evidence of fraud.

The second important aspect of Defendants' response is their repetition of the misleading argument that the fraud issue was decided by the state court, which led to an appeal to the Supreme Court of Virginia and the Benzinger petition to this Court, where in actuality the issue on appeal was the refusal of the state court to consider the fraud issue, as explained in Section III above.

The third important response to Izadpanah's argument against the application of res judicata is Defendants' repetition of their misleading argument that the district court found that Izadpanah had knowledge of the fraud in 1991, well before its discovery in 1992. The misleading character of this argument is described in Section VIII above.

At Page 18 of their brief, the latter argument is submitted by Defendants in support of their position that Keith v. Aldridge, 900 F.2d 736 (4th Cir. 1990) controls, rather than Hartnett v. Billman, 800 F.2d 1308 (4th Cir. 1986), the case authority relied upon by Izadpanah (although Defendants do not refer to Hartnett by name).

The Court will recall from Izadpanah's petition that Keith holds that, where an

unresolved issue is one that should have been resolved in a previous lawsuit, it will be precluded from a subsequent lawsuit. Keith also held that it is the existence of such an issue that controls, rather than a plaintiff's awareness thereof.

On the other hand, as is also discussed in Izadpanah's petition, Hartnett holds that an issue will not be precluded, whether it is an issue that was resolved or one that ought to have been resolved, where the plaintiff's lack of awareness of his cause of action is the result of intentional concealment by the defendant. Of course, the allegation herein is that the fraudulent nature of the Sirex judgment was concealed by the Defendants until Izadpanah's discovery of the scheme in 1992.

To counter the effect of Hartnett, Defendants repeat their misleading argument that Izadpanah knew of the fraud in 1991.

In addition to the foregoing three important aspects of the res judicata argument, Defendants, at Pages 15-16 of their brief, argue that the issue involving the Virginia court's attachment of the stock located in Maryland has been previously decided. The Court will note that this issue has been withdrawn from the case.

At Page 16 of their brief, Defendants also argue concerning issues of improper service and improper notice, as to the sale of the Aidant stock after its attachment. The Court will note that these issues are not a part of the instant petition.

At Page 17 of their brief, Defendants argue that the district court correctly ruled that Izadpanah's claim under Rule 10b-5 had been decided by the state court, notwithstanding that jurisdiction over such claim is exclusively in the federal courts, pursuant to 15 U.S.C. Section 78aa.

CONCLUSION

Izadpanah asks that his petition for a writ of certiorari be granted, Defendants

having presented arguments which are for the most part misleading or not responsive to the points raised in Izadpanah's petition; and that he be awarded his costs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing reply brief were mailed to Edward Gross, Esq., 3975 University Drive, Suite 410, Fairfax, 22030, Counsel for Respondents, on the 27th day of September, 1996.

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